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# **Redefining the role of TPIMs in combatting ‘home-grown’ terrorism within the widening counter-terror framework**

**Professor Helen Fenwick**

## **Abstract**

This article considers the current racheting up of the counter-terror response, triggering a mass of new and proposed counter-terror measures, partly in the Counter-Terrorism Bill 2015, which include strengthening TPIMs, put forward mainly to combat the threat represented by British citizens who have fought for ISIS. It argues that proposals to strengthen TPIMs should not be influenced by the false promise that they can provide a pathway to prosecution, and considers whether, contrary to current proposals, the impact of certain of the new measures could render TPIMs otiose. It further argues that if strengthened measures on the control orders model are needed, on the argument that TPIMs in their current form cannot answer effectively to the current threat, consideration should be given to introducing enhanced TPIMs, already available under the ETPIMs Bill, which are accompanied by safeguards not available in relation to TPIMs. So doing, it will be argued, would tend to focus minds on the temporary and ‘emergency’ status of such measures rather than normalising them.

## **Introduction**

We are currently witnessing a game-changing moment in counter-terror terms: the government intends to add a number of very far-reaching non-trial-based new measures to the existing ones, partly in the Counter-terrorism Bill 2015, with further measures to follow in 2015 depending on the result of the general election.<sup>1</sup> They include strengthening TPIMs (in the new Bill, Part 2), the replacement for control orders, mainly to combat the threat represented by British citizens who have fought for ISIS<sup>2</sup> or seek to travel to Iraq or Syria to do so. This therefore appears to be an opportune moment to reflect on the role of TPIMs within the current and changing counter-terror framework, and their relationship with prosecutions.

Post 9/11, in tandem with its criminal justice response to terrorist activity, the UK government has relied on using non-trial-based liberty-invading measures with a view to preventing terrorist activity, where both prosecution or deportation appear to be unavailable as options. While such measures were initially used post 9/11 to imprison non-nationals, they have been used from 2012 onwards almost exclusively against nationals, and in their current form impose restrictions falling far short of imprisonment. Such measures currently take the form of TPIMs - terrorism prevention and investigation measures under the Terrorism Prevention and Investigation Measures Act 2011 (TPIMA).<sup>3</sup> In the run up to the 5 year

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<sup>1</sup> BBC: 'David Cameron outlines new anti-terror measures to MPs' 1<sup>st</sup> September 2014; <http://www.bbc.co.uk/news/uk-29008316> (last viewed 04.10.14). See also note 103 below. Theresa May confirmed at the Conservative party conference, in September 2014, that she would introduce a counter-terrorism bill in November to strengthen TPIMs. The Counter-terrorism Bill 2015 was presented to Parliament on 26 November 2014 and had its second reading on 2<sup>nd</sup> December.

<sup>2</sup> The terrorist group variously known as 'Islamic state of Iraq and Syria' (ISIS) or 'Islamic State' (IS).

<sup>3</sup> For discussion, see: Helen Fenwick, "Designing ETPIMs around ECHR Review or Normalisation of 'Preventive' Non-Trial-Based Executive Measures?" (2013) 76(5) *Modern Law Review* 876; Alexander Horne and Clive Walker, "The Terrorism Prevention and Investigation Measures Act 2011: one thing but not much the other?" (2012) *Criminal Law Review* 421. See David Anderson QC, "Terrorism Prevention and Investigatory Measures in 2012" First Report March 2013 ('TPIMS in 2012'), paras 6.23, 11.33-38; <http://terrorismlegislationreviewer.independent.gov.uk/publications/first-report-tpims?view=Binary> (last viewed 04.10.14). David Anderson comments at para 1.13 of the First Report that "[t]he journey from indefinite detention (2001) through control orders (2005) to TPIMs (2011) has been in a liberalising direction".

renewal – or abandonment – of TPIMs, in 2015,<sup>4</sup> in light of the new Bill and current proposals for increased counter-terror measures, this article sets out to consider the cases for abandoning TPIMs or assigning them to a different role, or strengthening them. It focuses in particular on one aspect of the scheme: the extent to which, if at all, TPIMs do or could genuinely represent a pathway to the criminal investigation and prosecution of these suspects, providing a possible exit strategy that would eventually allow reliance on these ‘emergency’ measures to be discontinued.<sup>5</sup> It will be argued that reliance on a scheme deployed as an *alternative* to prosecutions as a means of facilitating criminal investigations, leading to prosecution, is self-contradictory. The formal framework is in place under TPIMs, as it was, to an extent, under control orders, to create the possibility of prosecution, but, this article will argue, in practice that framework has proved not only ineffective but inherently flawed since the twin aims of prosecution and prevention of terrorist-related activity cannot be realised under the same scheme, at least under a non-inquisitorial system. Thus the strengthening of TPIMs under the new Bill should be debated on that basis.

This piece proceeds to consider new and proposed measures which could potentially obviate the need for reliance on TPIMs or on other measures on that model, either by enhancing the chances of successful prosecutions of terror suspects or by preventing or curbing radicalisation of potential suspects or by enabling the deportation or non-entry into the country of suspect British citizens. Most such measures, especially those wholly or mainly under executive as opposed to judicial control, create tensions with the ECHR, but such tensions could, it will be argued, be alleviated to an extent if adoption of further measures occurred on the basis that they could potentially lead to the abandonment or minimisation of TPIMs, rather than merely assuming that TPIMs, especially in ‘strengthened’ form, must

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<sup>4</sup> TPIMA provides a 5 year renewal requirement, which will fall in 2015 under the new government; the review will provide an opportunity for considering the basis for the existence of such civil restriction measures.

<sup>5</sup> The author has discussed the other aspects of the scheme elsewhere: see ‘Designing ETPIMs’ n 3.

remain as part of the newly accepted counter-terror infrastructure. It is further argued that in so far as there is a case for strengthening TPIMs due to the currently raised threat level, their role could be taken by existing measures available under the ETPIM Bill, as explained below, to be used only on a temporary basis as *emergency* measures.

## **The changing nature of liberty-restricting civil measures post 9/11**

As is well documented, detention without trial under the Anti-Terrorism Crime and Security Act 2001 Part 4, gave way to control orders in 2005, under the Prevention of Terrorism Act 2005 (PTA) which in turn were superseded by TPIMs. While detention without trial was abandoned due to the finding of the House of Lords that the scheme was not ECHR-compliant,<sup>6</sup> control orders were replaced by TPIMs as an aspect of the Coalition government's policy in 2010 of creating a break with over-repressive state powers when the new government came to power.<sup>7</sup> In contrast to Part 4, the control orders scheme was not rejected in its entirety by the judges, but instead was moulded into greater ECHR compliance,<sup>8</sup> paving the way for the introduction of less repressive TPIMs. Indeed, TPIMA, in creating very light touch orders, imposed on the 'reasonable belief' standard, went further in the direction of such compliance than the judicial rulings on control orders required.<sup>9</sup> The inception of TPIMA was, however, followed rapidly by the introduction of enhanced TPIMs

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<sup>6</sup> *A and Others v Secretary of State for the Home Dept* [2005] 2 WLR 087.

<sup>7</sup> The Justice Secretary wrote on this: "The primary role of any government is to keep its citizens safe and free. That means both protecting them from harm and protecting their hard-won liberties..." "Justice and Security Green Paper" Cm 8194, October 2011. Further changes designed to protect liberties were effected in the Protection of Freedoms Act 2012, for example, in relation to enhanced checks and balances governing counter-terrorism related stop and search powers (ss59-61).

<sup>8</sup> See Helen Fenwick, "Recalibrating ECHR Rights, and The Role of The Human Rights Act Post 9/11: Reasserting International Human Rights Norms in the 'War On Terror'?" (2010) 63 *Current Legal Problems* 153. See also Conor Gearty, who has commented that 'the courts have drawn the repressive sting' from the control orders scheme: "The Human Rights Act: An Academic Sceptic Changes His Mind but Not His Heart" (2010) 6 *European Human Rights Law Review* 582, 585-6.

<sup>9</sup> In particular, forced relocation is not included in TPIMA and house detention, interpreted as meaning 14-16 hours detention a day, has been replaced by an 'overnight residence' requirement: see further 'Designing ETPIMs,' n 3, 896-7. But forced relocation would be reinstated under the 2015 Bill clause 12.

under the Enhanced Terrorism Prevention and Investigation Measures Bill 2011 (ETPIM Bill), on the basis that TPIMs did not provide a regime stringent enough to deal with future possible terrorist threats; TPIMA made only very limited provision for reliance on ETPIMs.<sup>10</sup> The Bill is available to be brought forward at any time in an unspecified emergency situation; if passed, it would set up ETPIMs as forming a separate, parallel regime running alongside the TPIMs one. In terms of the obligations they can impose ETPIMs are indistinguishable from ‘heavy touch’ control orders, and so would be in stronger tension with Article 5 ECHR.<sup>11</sup> ETPIMs can be imposed on a suspect previously subject to a TPIM even if no new terrorism-related activity (TRA) is apparent.<sup>12</sup> If the Bill was enacted suspects who had been subjected to TPIMs could be subjected to ETPIMs, so long as the existing evidence against them supported the case against them to the civil standard.<sup>13</sup> In terms of the strength of the obligations that can be imposed, the ETPIMs Bill appears to represent a repudiation of the tendency that saw the introduction of TPIMs rather than control orders.

In 2014 all the TPIMs in force bar one expired and were not renewed.<sup>14</sup> Although it appeared in 2014 that TPIMs were still viewed as an accepted part of the counter-terror infrastructure,<sup>15</sup> their use appeared to be “withering on the vine” according to the Joint Committee on Human Rights (JCHR).<sup>16</sup> That was partly or largely because they were seen as

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<sup>10</sup> The only provision that was made in that Act for ETPIMs applies where Parliament is in recess: s26 TPIMA. S26 provides a temporary power while Parliament is in recess to impose ‘enhanced measures’ if considered urgent.

<sup>11</sup> See Schedule 1 ETPIMs Bill and *Secretary of State for the Home Department v AP* [2010] 3 WLR 51. See for discussion, ‘Designing ETPIMs’ n 3, 896-7; see also ‘Recalibrating ECHR Rights’ n 8, 190-2.

<sup>12</sup> The new TRA referred to in the ETPIM Bill refers to TRA relevant to the imposition of an ETPIM, rather than to an existing TPIM (section 2(6)).

<sup>13</sup> See ETPIM Bill clause 2(1).

<sup>14</sup> All of the current TPIMs bar one had either run their course (2 years) or were not in force by February 2014 (David Anderson QC (Independent Reviewer of Terrorism Legislation) “Terrorism Prevention and Investigation Measures in 2013” Second Report March 2014 (‘TPIMs in 2013’) at p. 2 and Home Office ‘Terrorism Prevention and Investigation Measures (1 June 2014 to 31 August 2014’ 16 Oct 2014.

<sup>15</sup> David Anderson recommended their retention: see ‘TPIMs in 2013’ n 14, at p. 4.

<sup>16</sup> JCHR, “Post-legislative scrutiny: Terrorism Prevention and Investigation Act 2011” Tenth Report of Session 2013-2014, HL 113 HC 1014, January 2014 (‘TPIMA 2011’) at p. 5.

ineffective: their role in providing security came under question when two suspects absconded in 2012 and 2013 while subject to TPIM orders.<sup>17</sup>

Dissatisfaction with TPIMs led to proposals in 2013 to amend TPIMA in order to extend (and possibly strengthen) TPIMs.<sup>18</sup> In August 2014 there were recommendations to reinstate control orders, mainly to combat the problem posed by British jihadis returning to Britain after fighting in Syria or Iraq for ISIS.<sup>19</sup> When the terror threat level was raised from substantial to severe,<sup>20</sup> triggering the announcement of the new package of counter-terror measures, one of them included strengthening TPIMs<sup>21</sup> by inter alia allowing them to impose relocation, as control orders could do.<sup>22</sup> However, that would again create the risk of

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<sup>17</sup> On 1<sup>st</sup> November 2013; see Rosa Silverman "Terror suspect absconds while being monitored" *the Daily Telegraph* 4<sup>th</sup> November 2013. When he disappeared, Mr Mohamed was facing charges relating to 20 alleged breaches of his TPIM order. Mohamed was an alleged associate of Ibrahim Magag, another TPIM subject who absconded on 26<sup>th</sup> December 2012. Chris Grayling ordered a review of the measures as a result, and David Anderson notes that changes were implemented on the basis of this review, but the results of the review are confidential ('TPIMS in 2013' n 14, paras 4.37,4.38). Yvette Cooper, Shadow Home Secretary has said on this (see 'Cameron and Clegg seek agreement in anti-terror talks' *the Guardian* 1<sup>st</sup> September 2014): "There are currently no Tpins in use because the experts have warned that the police and the security services do not believe they are effective enough to be worth using..." (see at <http://www.theguardian.com/uk-news/2014/sep/01/cameron-clegg-anti-terror-talks-british-born-jihadis-syria-iraq>).

<sup>18</sup> The Home Affairs Committee "Counter-terrorism" Seventeenth Report, HC 231, 30<sup>th</sup> April 2014 ('Counter-terrorism Seventeenth Report'), para 109 has found that TPIMs need to be strengthened to prevent absconding; Yvette Cooper, Shadow Home Secretary, has observed: "We warned from the start that weakening these crucial counter terror powers was a serious error of judgement by the Home Secretary... For so many TPIMs to end at once raises serious challenges for the police and security services - especially in London where most of the terror suspects are based" (Press Release 5<sup>th</sup> November 2013; [http://www.politicshome.com/uk/article/87796/sign\\_up\\_pro.html](http://www.politicshome.com/uk/article/87796/sign_up_pro.html) (last viewed 04.10.14)).

<sup>19</sup> From Yvette Cooper, the Shadow Home Secretary, Lord Carlile, the Government's independent reviewer of terrorism legislation from 2001 to 2011, Sir Bernard Hogan-Howe, Commissioner of Police of the Metropolis (speaking on LBC on 27<sup>th</sup> August 2014, as reported in *the Telegraph* "British jihadists should be stripped of citizenship says top police officer" <http://www.telegraph.co.uk/news/worldnews/middleeast/syria/11058319/British-jihadists-should-be-stripped-of-citizenship-says-top-police-officer.html> (last viewed 04.10.14)).

<sup>20</sup> On 29<sup>th</sup> August 2014 (see MI5 Press Release "Threat level to the UK from international terrorism raised to severe" <https://www.mi5.gov.uk/home/news/news-by-category/threat-level-updates/threat-level-to-the-uk-from-international-terrorism-raised-to-severe.html> (last viewed 04.10.14)).

<sup>21</sup> HC Deb Vol. 585, Cols 24-6, 01.09.14. The Government had previously stated that it intends to carry out a review of TPIMs as part of a broader review of counter-terrorism powers: JCHR 'TPIMA 2011' n 16, para 82. David Cameron's Task-force for Tackling Violent Extremism had also recommended a range of changes in 2013: "Tackling Extremis in the UK," December 2013; [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/263181/ETF\\_FINAL.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/263181/ETF_FINAL.pdf) (last viewed 04.10.14).

<sup>22</sup> That had also been recommended earlier in 2014 by David Anderson, the current independent reviewer of terrorism legislation: 'TPIMS in 2013' n 14, p. 57, recommendation 4. See n9 above as regards the 2015 Bill.

breaching Article 5 ECHR,<sup>23</sup> and the Coalition government is clearly seeking to avoid following the Blair government's example of introducing draconian measures that are then watered down by the courts. Counter-terrorism rhetoric failed to match reality. But a continued preoccupation with reliance on such civil restriction measures is apparent, combined with vacillation as to the extent to which they can be allowed, as non-trial-based measures, to invade liberty.

### **Advantages of relying on non-trial-based executive measures**

After the abandonment of control orders from 2012 onwards there continued to be acceptance from the independent terrorism reviewer, David Anderson QC, and to an extent within Parliament, that employment of executive measures on the control order/TPIMs model should remain a vital part of counter-terror policy due to the difficulties of prosecuting a certain group of suspects,<sup>24</sup> but it also appeared to be accepted that the measures should continue to be sparingly invoked.<sup>25</sup> The Parliamentary Committee on ETPIMs accepted that the reasons for imposing a control order/TPIM on a particular suspect, as opposed to pursuing a

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David Anderson also recommended an extra power to compel attendance at meetings to establish communication with subjects, recommendation 6 (p. 57).

<sup>23</sup> *Secretary of State for the Home Department v AP* [2010] 3 WLR 51.

<sup>24</sup> Anderson 'TPIMs in 2013,' n 14, p. 4; the Joint Committee on ETPIMs agreed that there was a need for such measures, see 'Draft Enhanced Terrorism Prevention and Investigation Measures Bill' First Report Session 2012-2013 HL 70 / HC 495, November 2012, ('Draft ETPIM Bill First Report') paras 90-100.

<sup>25</sup> The government has recorded a commitment to use other measures, particularly prosecution or deportation, wherever possible; see eg "CONTEST: The United Kingdom's Strategy for Countering Terrorism" July 2011 1.18 *et seq*; [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/97994/contest-summary.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/97994/contest-summary.pdf) (last viewed 04.10.14). The result of this commitment is that few individuals have been subject to such measures. Around 45 people were, at various points, subjected to control orders: JCHR 16<sup>th</sup> Report 'Legislative Scrutiny: Terrorism Prevention and Investigation Measures Bill' Session 2010-12, HL 180 / HC 1482, July 2011. See also: Terrorism Prevention and Investigation Measures Bill ECHR Memorandum by the Home Office [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/98372/echr-memorandum.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/98372/echr-memorandum.pdf) (last viewed 04.10.14); only 9 TPIMs were imposed and as indicated above almost all of the last ones expired in February 2014 (see 'TPIMs in 2013' n 14 at p. 2).



prosecution, may not be openly scrutinised on national security grounds,<sup>26</sup> but that imposing such measures remained necessary.<sup>27</sup> The Counter-terror review 2011 had considered whether such measures should be maintained<sup>28</sup> rather than relying on surveillance,<sup>29</sup> concluding that while increased covert investigative resources could form an important part of any arrangements replacing control orders, surveillance alone could not mitigate risk to the level created by a regime on the control order model,<sup>30</sup> although such a regime should be much more closely linked to the criminal process than control orders had been.<sup>31</sup> The Security services have taken the position in responses to the independent reviewer that it is more resource-intensive to engage in extensive surveillance of certain suspects than it is to impose a control order/TPIM.<sup>32</sup> David Anderson considers not only that control orders have been effective in containing the threat, but that their use also releases resources for surveillance of other targets – which may represent a more serious threat.<sup>33</sup>

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<sup>26</sup> If there are security-based reasons for being unable to prosecute; see Joint Committee on ETPIMs, ‘Draft ETPIM Bill First Report,’ n 24, para 98. This author submitted to the committee that the SIAC transcript in relation to E’s challenge to Part 4 ACTSA (PTA/21/2007; see *SSHD v E* [2008] EWHC 585, 2008 WL 2148299) indicated that there appeared to be enough evidence to sustain a prosecution, but that the reasons were not given on the presumed basis that to give them would undermine national security: Transcript of Professor Fenwick’s evidence before Joint Committee on ETPIMs ‘Draft ETPIM Bill: *Oral Evidence*’, December 2012 at p. 46; <http://www.parliament.uk/documents/joint-committees/Draft%20ETPIMS%20Bill/JC%20on%20Draft%20ETPIMS%20Bill%20-%20consolidated%20oral%20evidence%20PUBLISHED.pdf> (last viewed 04.10.14).

<sup>27</sup> The Committee found in 2012: “the government must devise a system to tackle the ongoing terrorist threat from those who cannot – for whatever reason – be deported or safely prosecuted”: Joint Committee on ETPIMs, ‘Draft ETPIM Bill First Report,’ n 24, para 99.

<sup>28</sup> Secretary of State for the Home Department: “Review of Counter-Terrorism and Security Powers” Cm 8004, January 2011 (hereafter ‘Review of Counter-Terrorism and Security Powers 2011’) at p. 36.

<sup>29</sup> The Review received submissions from the police and the security agencies to the effect that surveillance is capable of both monitoring suspects’ activities and facilitating evidence-gathering processes, which can lead to prosecution and conviction, but that it does not of itself necessarily prevent or disrupt any terrorism linked activities: *ibid* p. 38; see also Joint Committee on ETPIMs, ‘Draft ETPIM Bill First Report,’ n 24, para 99.

<sup>30</sup> See ‘Review of Counter-Terrorism and Security Powers 2011,’ n 28, at p. 38.

<sup>31</sup> *Ibid* p.40 para 21(a).

<sup>32</sup> Secretary of State for the Home Department “The government response to the Report by David Anderson QC Seventh Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005”, Cm 8443, September 2012 (‘The Government Response to the Seventh Report’) at p. 6.

<sup>33</sup> David Anderson QC Independent Reviewer of the Prevention of Terrorism Act (PTA) pursuant to s14(6) PTA “Control Orders in 2011” Seventh Report March 2012, executive summary; see at <http://www.official-documents.gov.uk/document/other/9780108511417/9780108511417.pdf> (last viewed 04.10.14).

## **Creating a pathway from imposing non-trial-based measures to prosecution for terrorism offences?**

Both the TPIMs and ETPIMs schemes were presented as resembling the control orders one in its *preventive* aspect, but the use in the titles of both instruments of the term ‘Investigation’ was intended to indicate that both schemes, in contrast to the control orders one, have a more genuinely significant *investigative* element. The emphasis on investigations was intended to indicate that use of non-trial-based measures could provide a pathway to prosecutions, meaning that some measures could eventually be abandoned in favour of use of the criminal law and criminal justice system. The use of such measures for investigation is referred to in the UK’s *Pursue* strategy<sup>34</sup> which finds that they are designed to “provide security” while enabling the “collection of evidence which can lead to prosecution”.<sup>35</sup>

### *Investigative role of TPIMs and ETPIMs: opportunities for collecting data*

The government response to the Counter-Terror review, as indicated above, accepted that TPIMs should have the dual role of curbing and controlling the activities of suspects, as well as allowing increased surveillance of them, with a view to a prosecution.<sup>36</sup> Control orders, especially the earlier ‘heavy touch’ ones, clearly placed the emphasis most firmly on their preventive role, disregarding their investigative one in terms of the obligations imposed. The ban on forms of electronic communication combined with house detention, relocation and interference with association meant that controlees were isolated from certain associates (who

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<sup>34</sup> Secretary of State for the Home Department: “CONTEST The United Kingdom’s Strategy for Countering Terrorism,” Cm 8123, July 2011, para 4.21.

<sup>35</sup> *Ibid* para 4.3.

<sup>36</sup> Secretary of State for the Home Department: “Draft Enhanced Terrorism Prevention and Investigation Measures Bill,” Cm 8536, January 2013, para 2.12.

might also be suspects), meaning that their potential participation in suspected terrorist conspiracies was – in effect – placed in a state of suspense.<sup>37</sup> The emphasis was on the isolation of the controlee, in physical and communicative terms. But restrictions on the use of communication technology also restricts it as a source of information to the security services. That aspect of the control orders scheme was severely criticised in the government’s 2011 review of counter-terrorism and security powers<sup>38</sup> on the basis that the suspect was placed in a form of limbo which made it unlikely that any new terrorism-related activity could occur which could be the subject of a prosecution.

Interference with the suspect’s use of communications technology is also a significant aspect of TPIMs. But the level of interference was higher under control orders, and would be under ETPIMs,<sup>39</sup> than it is under TPIMs. TPIMs relax the rules on access to forms of electronic communication,<sup>40</sup> and do not at present allow for the physical isolation allowed for by control orders in the form of forced relocation or imposition of geographical boundaries.<sup>41</sup> The rationale for such relaxation appeared to be that since the suspect is not *as* isolated from possible associates, terrorism-related activity might occur, or past occurrences of such activity might be revealed, leading to the possibility of a prosecution.

Although ETPIMs also include the term ‘investigation’, the features of TPIMs that are viewed as potentially facilitating the possibility of prosecution are present to a significantly

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<sup>37</sup> See eg L. Zedner, ‘Preventive Justice or Pre-punishment? The Case of Control Orders’ (2007) 60 CLP 174.

<sup>38</sup> Secretary of State for the Home Department “Review of Counter-Terrorism powers” Lord MacDonald Report, Cm 8003, January 2011, para 29 *et seq.*

<sup>39</sup> ETPIM Bill Sched 1 para 8.

<sup>40</sup> Sched 1 para 7(1): ‘The Secretary of State must allow the individual to possess and use (at least) one of each of the following descriptions of device (subject to any conditions on such use as may be specified under sub-para (2)(b)) – 3(a) a telephone operated by connection to a fixed line; 3(b) a computer that provides access to the internet by connection to a fixed line (including any apparatus necessary for that purpose); 3(c) a mobile telephone that does not provide access to the internet’.

<sup>41</sup> Schedule 1 TPIMA para 2; TPIMA does not provide for general geographical restrictions but can bar the controlled person from entering specified locations. The 2015 Bill clause 12 will allow for the re-imposition of forced relocation.

lesser degree: a ban on most or all methods of electronic communication is possible,<sup>42</sup> and the provisions creating social isolation are not only much more far-reaching under ETPIMs, but also include forced relocation,<sup>43</sup> thus insulating the suspect from others in the way that control orders often did. Since ETPIMs resemble control orders in this respect, their potential as investigative measures appears to be diminished, so deployment of ETPIMs appears to represent a reneging on one of the core principles apparently underpinning the TPIMs regime.

But it must be questioned whether relaxing the measures creating social isolation of suspects and use of communications technology in TPIMs is likely in practice to contribute much to the chances of gathering evidence that could be used in a prosecution. Suspects are aware that TPIMs are limited to two years and, as David Anderson has pointed out, they are likely to refrain from TRA for that time period,<sup>44</sup> knowing that they are under suspicion and surveillance via the TPIM. In other words, they are likely to seek to sit out the TPIM rather than risk providing any evidence that could enhance the chance of a prosecution. The fact that none of the suspects subjected to TPIMs were prosecuted for terrorism offences (apart from breaches of the TPIM) supports this contention if it is assumed that some or all of those suspects would have engaged in TRA but for the TPIM. Thus if enhancing the chances of prosecution is in any event unlikely in respect of suspects subjected to TPIMs, the case for relaxation of the measures restricting communication or association cannot be supported by reference to such enhancement.

### *Investigative and prosecutorial role of TPIMs/ETPIMs*

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<sup>42</sup> ETPIM Bill Sched 1 para 8.

<sup>43</sup> ETPIM Bill Sched 1 para 1.

<sup>44</sup> David Anderson 'TPIMs in 2012,' n 3, 8.13-8.16.

Control orders did contain a prosecutorial element which could have triggered criminal investigations, which was strengthened to an extent in TPIMA (and would apply also to ETPIMs) but not to the extent that a clear distinction between the two schemes in terms of enhancing the prospect of prosecution was created. As indicated, the relationship to prosecution as well as to investigation was supposed to be stronger under a TPIM or an ETPIM notice than a control order, in terms not only of enhancing the chances of prosecution, but in relation to the continuing *review* of that possibility.<sup>45</sup> Under the PTA s8 the relevant chief officer of police had to keep the prospects of prosecution under review, consulting the CPS as necessary. Under TPIMA this obligation is somewhat strengthened under s10, which also applies in relation to ETPIMs.<sup>46</sup> There is a duty to consult the chief officer of the appropriate police force as to the prospects of prosecution<sup>47</sup> before imposing a TPIM or an ETPIM.<sup>48</sup> The chief officer must consult the relevant prosecuting authority before responding (s10(6)), although the duty to consult can be satisfied by a consultation that occurred previously (s10(9)). As far as TPIMs are concerned, this clearly refers to the previous consultation duty under the PTA s8. As regards this *initial* imposition of a TPIM, in *Secretary of State for the Home Department v CC, CF*,<sup>49</sup> the first case on TPIMA, it was noted that in *MB v Secretary of State for the Home Department*<sup>50</sup> the Court of Appeal had stated that: “It is implicit in the scheme that if there is evidence that justifies the bringing of a criminal charge, a suspect will be prosecuted rather than made the subject of a control order.” The Court found that the same is true of TPIM notices.

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<sup>45</sup> Secretary of State for the Home Department: “The Government Reply to the Sixteenth Report of the Joint Committee on Human Rights” Cm 8167, September 2011 (hereafter ‘Government Reply to the Sixteenth Report’) pp. 2-3.

<sup>46</sup> Clause 3 ETPIM Bill.

<sup>47</sup> Under s10(2) this means: “whether there is evidence available that could realistically be used for the purposes of prosecuting the individual for an offence relating to terrorism”.

<sup>48</sup> Whether by the ‘urgent’ procedure allowing the Home Secretary to impose a TPIM (s7 TPIMA) or ETPIM (cl 3 ETPIM Bill, s10(1) TPIMA) or when applying to a court under s6 TPIMA.

<sup>49</sup> [2012] EWHC 2837 (Admin).

<sup>50</sup> [2007] QB 415, para 53.

As regards continuing review of the prospects of prosecution the Secretary of State must inform the chief officer that the TPIM/ETPIM notice has been served (s10(4)), and the chief officer must “secure that the investigation of the individual’s conduct, with a view to a prosecution of the individual for an offence relating to terrorism, is kept under review throughout the period the TPIM [or ETPIM] notice is in force” (s10(5)). Thus the duty to keep the possibility of prosecution under review is slightly stronger under TPIMs/ETPIMs, since the chief officer must be consulted before the notice is imposed, but the danger that this process is merely part of a tokenistic, routinized, presentational exercise – as it appears to have been in relation to control orders – still remains.<sup>51</sup> Prosecutions arose as a result of the review duty under s8 PTA. Given that the same persons were then subjected to TPIMs, the chances of a prosecution are low, in reality, and therefore the review process as regards prosecution has inevitably taken on a tokenistic, box-ticking air, as David Anderson has acknowledged.<sup>52</sup>

On its face it appears to be questionable whether the duty as regards review of the chances of prosecution should be the same for ETPIMs as for TPIMs: it might appear that it should be higher, since ETPIMs have greater punitive impact. For example, it could be one of the requirements for the imposition of an ETPIM after a TPIM that there has been a multi-agency<sup>53</sup> assessment of the chances of a successful prosecution, and it has been found that at

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<sup>51</sup> Liberty “Second Reading Briefing on the Terrorism Prevention and Investigation Measures Bill” June 2011 paras 20, 37-38; <http://www.liberty-human-rights.org.uk/pdfs/policy11/liberty-s-second-reading-briefing-on-the-terrorism-prevention-and-investigat.pdf> (last viewed 04.10.14).

<sup>52</sup> The focus of TPIM review has moved decisively towards preventing breach rather than prosecutions: David Anderson ‘TPIMs in 2012,’ n 3, para 8.6; ‘TPIMs in 2013,’ n 14, para 4.24: “The nature and tone of [TPIM Review Group] meetings (some of which I attended) changed appreciably in the aftermath of the December 2012 abscond... Police and MI5 were questioned in greater detail about the adequacy of measures to manage the national security risk posed by each subject, the assessed abscond risk and actions taken to mitigate it, the extent of overt monitoring and covert surveillance, breaches, activities of concern and proposed responses. They were challenged in particular to consider the potential benefits of tightening the measures on individual subjects...”

<sup>53</sup> Eg involving police, security service personnel, and a barrister with relevant expertise.

present a prosecution would not succeed. A condition for the renewal of a TPIM after one year could include a similar review of the current feasibility of a prosecution.

But if in reality the chances of prosecution are very low, tinkering with the review process for TPIMs/ETPIMs would merely amount to an empty exercise. The changes to the process made under TPIMA fail to address one of the fundamental barriers to prosecution, which is that the security services tend not to view prosecution as the appropriate process, due to the sensitive nature of the material on which the suspicion against the controlled person is based. So the extent to which TPIMA indicates a genuine allegiance to investigation and prosecution in comparison with the PTA may be doubted. The Joint Committee on Human Rights has attacked the TPIMs legislation in its current form due to its dual role, arguing that it does not go far enough in promoting criminal investigations and thus furthering criminal prosecutions.<sup>54</sup> In essence it is argued that TPIMs still represent a strategy for temporarily ‘neutralising’ terror suspects which operates as an alternative to using the criminal justice system, an argument that would apply *a fortiori* to ETPIMs. The Joint Committee, when engaging in pre-legislative scrutiny, found that the TPIM Bill was clearly more committed to disruption and prevention than to investigation and prosecution.<sup>55</sup> The Committee therefore recommended amendments to the Bill which would have linked TPIMs more strongly to the criminal justice process.<sup>56</sup> Those amendments were not, however, accepted,<sup>57</sup> and for obvious reasons there is likely to be little opportunity for their revival in relation to the ETPIM Bill. In its most recent report, conducting post-legislative scrutiny, the Committee found: ‘our

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<sup>54</sup> JCHR ‘TPIMA 2011’ n 16, p. 13.

<sup>55</sup> Joint Committee on Human Rights (JCHR) 16<sup>th</sup> Report ‘Legislative Scrutiny: Terrorism Prevention and Investigation Measures Bill’ HL 180, HC 1482 (2011) paras 1.11, 1.12.

<sup>56</sup> “Amendments proposed by the committee included: when imposing TPIMs, the DPP (or relevant prosecuting authority) should be satisfied that a criminal investigation into any individual’s involvement in terrorism-related activity is justified, and will not be impeded by any of the measures imposed; provision for judicial supervision in relation to the ongoing criminal investigation...”, *ibid* p.2.

<sup>57</sup> Secretary of State for the Home Department ‘Government Reply to the Sixteenth Report,’ n 45, pp. 5-6.

...scrutiny has failed to find any evidence that TPIMs have led in practice to any more criminal prosecutions of terror suspects.’<sup>58</sup>

## **Abandoning TPIMs/ETPIMs in favour of prosecutions?**

The Communications Data Bill<sup>59</sup> would have placed a duty on data controllers and Internet service providers to provide details to public authorities of messages sent on social media, webmail, voice calls over the internet, and gaming, in addition to emails, texts and phone calls.<sup>60</sup> The duty to provide details would not have covered the content of communications,<sup>61</sup> but details, such as time sent, mode of communication – metadata.<sup>62</sup> The Bill received significant support, especially after the Woolwich killing, including from two former Labour home secretaries, a security minister, and the former independent reviewer of terror laws; Theresa May also recently attacked the Liberal-Democrats for blocking it.<sup>63</sup> It had however attracted significant criticism inside and outside Parliament, especially from the Liberal-

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<sup>58</sup> JCHR ‘TPIMA 2011,’ n 16, p. 3.

<sup>59</sup> Until recently the government were revising the Communications and Data Bill; Lord Wallace of Saltaire, commenting on the status of the Bill, observed in March 2014 that “[t]he Government have been developing a draft communications data Bill on which we will all have to consider how we move forward, probably in the first Session of the next Parliament” HL Deb vol 752, col 1220, 4<sup>th</sup> March 2014.

<sup>60</sup> The new regime was intended to replace Part 1 Chapter 2 of the Regulation of Investigatory Powers Act 2000 (“RIPA”) and Part II of the Anti-Terrorism Crime and Security Act 2001 (“ACTSA”) and was intended to sit alongside the Data Retention (EC Directive) Regulations 2009, but this was declared invalid by the ECJ in 2014 (*Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources* (C-293/12) [2014] All ER (EC) 775).

<sup>61</sup> Access to content is governed by Part 1, Chapter 1 of the Regulation of Investigatory Powers Act 2000 (RIPA).

<sup>62</sup> Secretary of State for the Home Department “Draft Communications Data Bill” Cm 8359, June 2011, para. 9. Clause 1 of the Bill enabled the Secretary of State, by order, to ensure that communications data was available to be obtained by the police and certain public authorities (under Part 2) for a “permitted purpose” as per RIPA s22(2). The duty was to be enforced by injunction or specific performance of a statutory duty under s45 of the Court of Sessions Act (cl 8(2)).

<sup>63</sup> See Chris Mason “Tory-Labour Pact Could Save Data Bill, Says Lord Howard” BBC (26 May 2013), <http://www.bbc.co.uk/news/uk-politics-22673156> (last viewed 04.10.14). Theresa May’s attack came at the Conservative Party conference – see A Travis the Guardian 30.9.14.



Democrats,<sup>64</sup> and would possibly have been open to challenge under EU law. The European Court of Justice recently ruled that the 2006 Data Retention Directive is invalid on the grounds that it severely interferes with two fundamental rights: the right to respect for private life and to the protection of personal data.<sup>65</sup>

One of the key powers provided for in the Bill – to impose a duty on telecommunications operators to retain data – was captured instead in the Data Retention and Investigatory Powers Act 2014<sup>66</sup> which was rushed through Parliament in one day as an emergency measure, and recently received Royal Assent.<sup>67</sup> So doing aroused suspicion in some quarters that introducing the new statute as an emergency measure was merely a means of evading the controversy surrounding the previous Bill,<sup>68</sup> while ensuring that one of the powers the Bill would have provided were retained. But since data retention no longer has the backing of the EU such national legislation is open to challenge, although the 2014 Act provides a response to the ECJ judgment since it provides that the Secretary of State may enact safeguards limiting the content and use of data retained.<sup>69</sup>

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<sup>64</sup> Nick Clegg, the Deputy Prime Minister, considered that he had won a very significant political victory when he prevented the draft bill being allowed into the Queen's speech 2013 (BBC "Nick Clegg: No 'web snooping' bill while Lib Dems in government" 25<sup>th</sup> April 2013; see at <http://www.bbc.co.uk/news/uk-politics-22292474>).

<sup>65</sup> *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources* (C-293/12) [2014] All ER (EC) 775 para 65.

<sup>66</sup> Section 1 of the 2014 Act provides: 'The Secretary of State may by notice (a "retention notice") require a public telecommunications operator to retain relevant communications data if the Secretary of State considers that the requirement is necessary and proportionate for one or more of the purposes falling within paragraphs (a) to (h) of section 22(2) of the Regulation of Investigatory Powers Act 2000 (purposes for which communications data may be obtained)'. The provisions will be amended under clause 17 of the 2015 Bill to cover data that can be used to identify an internet protocol address or other identifier. Section 1 applies to telephones (both landline and mobile) and to internet-based communications (including email, instant messaging, web-browsing, social media); see the Data Retention (EC Directive) Regulations 2009 Schedule Pts 1-3.

<sup>67</sup> On 17th July 2014.

<sup>68</sup> Liberty: "Liberty Represents MPs David Davis and Tom Watson in legal challenge to Government's 'emergency' surveillance law" Press Release, 22<sup>nd</sup> July 2014; <https://www.liberty-human-rights.org.uk/news/press-releases/liberty-represents-mps-david-davis-and-tom-watson-legal-challenge-government%E2%80%99s> (last viewed 04.10.14).

<sup>69</sup> Data Retention Act 2014: s1(3) 'The Secretary of State may by regulations make further provision about the retention of relevant communications data...' s1(4) 'Such provision may, in particular, include provision about— (a) requirements before giving a retention notice, (b) the maximum period for which data is to be retained under a retention notice, (c) the content, giving, coming into force, review, variation or revocation of a

Availability of such data might enhance the possibilities of prosecution in some instances, according to Lord Carlile,<sup>70</sup> and might be of pertinence in relation to the current use of social media by ISIS and ISIS supporters in the UK to spread propaganda and aid in radicalisation. Making such data available would also arguably strengthen the case for allowing a minimum level of access to electronic communications under a TPIM, and some internet or phone access under an ETPIM, even though in that instance no minimum level is specified in the ETPIM Bill. Communications data (CD) are already being used in seeking to uncover and prosecute persons in relation to terrorist plots, via requests under Part 1 Chap 2 Regulation of Investigatory Powers Act 2000. Those requests could now apply to a wider range of data but obviously would only be of value if the operators in question were under a duty to retain the data: s1 of the 2014 Act has the purpose of allowing such a duty to be imposed. The Parliamentary Intelligence and Security Committee (ISC) has noted that CD can be immensely valuable: in the ISC's Review of the 7/7 terrorist attacks, the Committee noted the scale of the 2003–04 Counter-Terrorism (CT) investigation known as Operation CREVICE (an investigation into a group of terrorists who were plotting to detonate a fertiliser bomb in the UK in 2004).<sup>71</sup> At the time, this was the largest operation of its kind ever mounted by the Security Service and more than 4,000 telephone contacts were analysed.<sup>72</sup> The ISC considered that the Communications Data Bill, if enacted, would provide the best solution to the problem of the declining availability of CD (due to use of new technology and unlimited phone tariffs);<sup>73</sup> the 2014 legislation will now require the relevant companies to collect and

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retention notice, (d)the integrity, security or protection of, access to, or the disclosure or destruction of, data retained by virtue of this section...

<sup>70</sup> Lord Carlile of Berriew QC 'Sixth Report of the Independent Reviewer Pursuant to s14(3) of the Prevention of Terrorism Act 2006', 6 February 2011, para 76.

<sup>71</sup> Prime Minister "Intelligence and Security Committee Annual Report 2011-12", Cm 8403, July 2012 para 117.

<sup>72</sup> See The Prime Minister "Access to communications Data by the Intelligence and Security Agencies" Cm 8514, February 2013, para 18.

<sup>73</sup> *Ibid* para 44.

retain the information in question if notified that they are under a duty to do so by the Home Secretary. But the question will be whether the safeguards are sufficient to avoid breaching Article 8 ECHR and/or Article 7 of the EU Fundamental Charter.

The infrastructure for use of criminal prosecutions in a *preventive* as well as punitive sense, bearing in mind the possibility of suicide bombing, is already in place in the sense that very wide offences were introduced in the Terrorism Act 2006, including a preparatory offence catching very early-stage preparation for terrorist acts,<sup>74</sup> and an offence of glorifying terrorism;<sup>75</sup> the proscription-related offences in the Terrorism Act 2000, as amended, are very broad, and have a preventive aspect in that they catch membership of a proscribed organisation before any other TRA can occur.<sup>76</sup> However, the inclusion of the very early intervention preparatory offence in s5 TA 2006 may be of limited efficacy in relation to ‘low-tech’, random attacks by individuals not dependent on planning, expertise or a particular organisation, which is one form that ‘home grown’ terrorism in the UK appears to be taking.<sup>77</sup>

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<sup>74</sup> Section 5 TA 2006. Between 2010-2013 there were 78 prosecutions under the TA 2000 and 20 under either Schedule 7 TA 2000 or other legislation (Home Affairs Committee ‘Counter-terrorism Seventeenth Report,’ n 18, p. 5).

<sup>75</sup> Section 1(3) TA 2006.

<sup>76</sup> For discussion see Helen Fenwick “The Anti-Terrorism, Crime and Security Act 2001: A Proportionate Response to 11 September?” (2002) 65(5) *Modern Law Review* 724, 757; Clive Walker “Terrorist offences: Terrorism Act 2000 s.11(1) – belonging to a proscribed organisation” *Criminal Law Review* [2005] 985.

<sup>77</sup> See Home Affairs Committee ‘Counter-terrorism Seventeenth Report,’ n 18, paras 12-13; Secretary of State for the Home Department “CONTEST The United Kingdom’s Strategy for Countering Terrorism Annual Report” Cm 8583, March 2013, p. 8; April 2014, Cm 8848, p.15. In 2013 high profile examples of planned attacks in Luton, Rochdale and Yorkshire appeared to be ‘low-tech’ and not centrally organised; see James Kelly, ‘Birmingham Men Guilty of Mass Bomb Plot’ BBC News, 21<sup>st</sup> February 2013 (see at <http://www.bbc.co.uk/news/uk-21534048> (last viewed 04.10.14)), Press Association ‘Luton terror plot: four Jailed over plan to bomb army centre.’ *the guardian* 18<sup>th</sup> April 2013 (<http://www.guardian.co.uk/uk/2013/apr/18/luton-terror-plot-four-jailed> (last viewed 04.10.14)), BBC News ‘Terror Director Briton given life’ 19<sup>th</sup> December 2008 (<http://news.bbc.co.uk/1/hi/uk/7791602.stm> (last viewed 04.10.14)). The problem of “home grown terrorism” has, of course, become widely accepted since 7/7 which was perpetrated by British nationals; see further Alejandro Beutel, ‘Radicalization and Homegrown Terrorism in Western Muslim Communities’ Minaret of Freedom Institute, 30<sup>th</sup> August 2007, Section II, <http://www.minaret.org/MPAC%20Background.pdf> (last viewed 04.10.14). The murder of Lee Rigby in Woolwich in November 2013 provides an obvious example. Forms of ‘home-grown’ terrorism may currently be linked to a change in strategy by Al Qaeda and linked groups, whereby more spectacular, complex operations that can be fairly readily detected by Western intelligence agencies are being abandoned in favour of ‘lone wolf’

The tendency in 2013-14 of a small number of young radicalised Muslims to travel to Syria or Iraq to fight with certain extremist groups, including ISIS,<sup>78</sup> means that the offence of being present at a place used for training under the Terrorism Act 2006 s8 would probably be applicable: section 8 prohibits anyone from being at a place where weapons training is going on (whether in the UK or abroad), provided the person knew or believed that training was happening, or a reasonable person would have known. It must also be proved that the training was provided for purposes connected with 'acts of terrorism'. S6 of the 2006 Act prohibits anyone from training others in terrorist activities, or from receiving training, and also carries a maximum penalty of 10 years' imprisonment. There were a total of 69 arrests in the first half of 2014 for a range of offences: fundraising for terrorist activity; the preparation and/or instigation of terrorism acts; travelling abroad for terrorist training. But obviously the burden of proof is on the Crown to prove the different elements of the offence, which presents grave difficulties given the civil war in Syria and the conflict in Iraq. Someone who has travelled back to the UK via Turkey may have also been to Iraq, been trained by ISIS or have fought with them, but obtaining proof of so doing to the criminal standard is highly problematic. As a result, Sir Bernard Hogan-Howe has recommended the introduction of a "rebuttable presumption" that anyone who visits Syria without prior notice to the authorities should be treated as a terror suspect.<sup>79</sup> The government has rejected that possibility, but use of TPIMs which do not require proof to the criminal standard (under the 2015 Bill the standard of proof

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strikes against soft targets such as high profile sporting events or shopping centres, where security is weak. See: J. Simon, *Lone Wolf Terrorism Understanding the Growing Threat* (Prometheus books: Amherst, 2013). That also appears to be an ISIS tactic: it was reported on 18 Sept 2014 (see eg the Guardian coverage) that a senior member of Islamic State was urging a ISIS supporters in Australia to carry out public beheadings, leading to the largest counter-terrorism raids in the country's history. More than 800 police officers were involved in raids in Sydney's north-west and 15 people were detained.

<sup>78</sup> Estimated at 500; see BBC 'Tracking Syria fighters now main task for MI5' 20<sup>th</sup> June 2014; <http://www.bbc.co.uk/news/uk-27947343> (last viewed 04.10.14).

<sup>79</sup> Interview on LBC on 27<sup>th</sup> August 2014, n 19. This proposal has also been put forward by Boris Johnson writing for the Telegraph: "Do nothing, and we invite the tide of terror to our door" *the Telegraph*, 24<sup>th</sup> August 2014; <http://www.telegraph.co.uk/news/uknews/defence/11054093/Do-nothing-and-we-invite-the-tide-of-terror-to-our-front-door.html> (last viewed 04.10.14).

will be raised to the civil standard: clause 16(1)) is a possible alternative, if the person in question can be identified.

The definitions of TRA in TPIMA and in the ETPIM Bill overlap to an extent with a range of those existing offences.<sup>80</sup> The infrastructure for preventive prosecution in cases involving material sensitive on national security grounds is also in place in the sense that some modifications to the criminal trial are possible, including enabling witness anonymity and using PII certificates or orders that entirely exclude the reporting of a criminal trial, a measure recently used by the CPS (to great controversy).<sup>81</sup> These developments in the prosecutorial infrastructure in the two senses mentioned, may be being matched by enhanced security service and police cooperation in terrorism cases.<sup>82</sup> It may be noted that the UK already has a better record than comparable allies, such as the US, in terms of prosecuting terrorism suspects in ordinary courts.<sup>83</sup>

## **Diversification of non-trial based counter-terror measures rendering TPIMs otiose?**

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<sup>80</sup> TPIMA 2011 s4(1)(a)-(d) overlaps with TA 2006 ss 1-8. The definition of 'terrorism' governing TRA for the purposes of the TPIM/ETPIM legislation and for purposes of the various offences in ss1-8 TA 2006 is the same.

<sup>81</sup> The order is possible under both the court's 'inherent jurisdiction' and the Criminal Procedure Rules Pt 16, 16.4 (in force from Oct 2013). An aspect of it was challenged in the Court of Appeal on the basis that no exceptional justification for both anonymising the defendants and conducting the proceedings in camera was apparent on the basis of a risk to the administration of justice: *Guardian News and Media Ltd v AB CD* (2014) CO 2014/02393C1.

<sup>82</sup> Intelligence and Security Committee "Annual Report 2012-2013" HC 547, July 2013, pp. 12-13.

<sup>83</sup> See David Jenkins "The Closure of Guantanamo Bay: What Next for the Detainees" (2010) *Public Law* 46, 56-57; Clive Walker "Prosecuting terrorism: the old Bailey versus Belmarsh" (2009) 79 *Amicus Curiae* 22. EHRC "The impact of counter-terrorism measures on Muslim communities" Research Report 72, 2011; [http://www.equalityhumanrights.com/sites/default/files/documents/research/counter-terrorism\\_research\\_report\\_72.pdf](http://www.equalityhumanrights.com/sites/default/files/documents/research/counter-terrorism_research_report_72.pdf) (last viewed 04.10.14): "In the decade since 9/11, 237 individuals have been convicted of terrorism-related offences. A further 48 (52) individuals have been made the subject of control orders. But the security services have estimated that 2,000 individuals represent a threat."

We are currently seeing a diversification of counter-terror measures in the 2015 Bill, and proposed measures, which include: withdrawal of passports or citizenship; a range of new counter-radicalisation measures; curbs on liberty on the control orders model. That raises two questions in relation to TPIMs: if some British suspects could now be deported or otherwise excluded from the country, does or could that diminish their utility, bearing in mind that Part 4 ACTSA and control orders were introduced partly to overcome the difficulty of deportation? Further, if, as discussed, the chances of prosecution of such suspects have increased, rather than rendering TPIMs more repressive as currently proposed, should TPIMs play a revised and diminished role amid the range of new and proposed measures?

*Withdrawal of passports or of citizenship; temporary exclusion orders*

Previously British citizens could not be stripped of their citizenship under deprivation of citizenship orders unless they had dual nationality.<sup>84</sup> But under the Immigration Act 2014 there is now provision in s66 which amends the British Nationality Act 1981 (inserting s4A)

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<sup>84</sup> Under section 40 of the British Nationality Act 1981, as amended in 2006, the Home Secretary may make an order depriving a person of citizenship status if he or she is "satisfied that deprivation is conducive to the public good". Such orders could not be used where they would leave the individual in question stateless usually because he/she does not have dual nationality (although it had appeared that it was not necessary for the person to hold another nationality before losing UK citizenship, provided they are deemed eligible to seek a passport from another country); the Supreme Court ruled unanimously in *Al-Jedda v SSHD* [2013] UKSC 62, [2013] WLR(D) 371 that the Home Secretary's actions would illegally make the applicant, Hilal al-Jedda, stateless). In the Home Affairs Committee 'Counter-terrorism Seventeenth Report,' n 18, para 98 *et seq* government proposals for removing British citizenship from foreign terror suspects, leaving them stateless (by Clause 18 of the Immigration Bill 2014), were considered; however, the plans were criticised for being reactive policy-making (para 101) and the House of Lords rejected the amendment (HL Deb, Vol 753, Col 1167, 7<sup>th</sup> April 2014). The Home Affairs Committee further observed that even if the plans were implemented, it would still be necessary to find a state willing to receive them and that this fact might limit the utility of such a measure (para 101). In general, the use of such Deprivation of Citizenship Orders on grounds that deprivation is conducive to the public good has increased recently (para 94-96) but reporting on its use remains limited; the Committee recommended quarterly reports to Parliament on the use of such measures, a level of accountability similar to that under the TPIMs reporting regime (para 96; TPIMA 2011 s19). The Home Secretary has targeted a number of dual-nationals using such orders (Hansard Briefing Note (Melanie Gower Home Affairs Section) "Immigration Bill: Deprivation of Citizenship" SN/HA/682, May 2014 p. 7) and there were 24 such orders between 2006-2013; the Bureau of Investigative Journalism have an ongoing investigation into the use of this power: see Alice Ross and Patrick Galey "Citizenship Revoked: The 53 Britons stripped of nationality" May 2014; <http://www.thebureauinvestigates.com/2014/06/03/interactive-the-53-britons-stripped-of-their-nationality/> (last viewed 04.10.14).

to allow removal of citizenship if the conduct of the person is ‘seriously prejudicial to the vital interests of the UK, any of the Islands, or any British overseas territory’ (s4A(b)), if the citizenship status results from the person’s naturalisation, and ‘the Secretary of State has reasonable grounds for believing that the person is able, under the law of a country or territory outside the United Kingdom, to become a national of such a country or territory’ (s4A(c)).<sup>85</sup> Section 4A(c) overturns the findings of the Supreme Court in *Al-Jedda*<sup>86</sup> to the effect that a person is rendered stateless if at the time when he is stripped of his citizenship he does not have another nationality. The Court found that it was not relevant that the person in question could have attained another nationality previously and would be likely still to be able to do so. S4A(c) was included in an attempt to comply with the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness, but could render a person stateless where, despite showing the reasonable grounds in question, the person could not in practice attain another nationality. Therefore compliance may not have been achieved. The provision is highly controversial and racially charged since it makes citizenship dependent more on country of origin, than on country within which citizenship has been exercised. However, it has not been extended to cover persons *born* in Britain even where s4A(c) might apply (as well as s4A(b)).

In 2013 the Home Secretary announced that she would exercise powers under the royal prerogative, to withdraw passports from terrorist suspects if so doing would be conducive to

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<sup>85</sup> Section 66: Deprivation if conduct seriously prejudicial to vital interests of the UK:

(1) In section 40 of the British Nationality Act 1981 (deprivation of citizenship), after subsection (4) insert—  
“(4A) But that does not prevent the Secretary of State from making an order under subsection (2) to deprive a person of a citizenship status if (a) the citizenship status results from the person’s naturalisation, (b) the Secretary of State is satisfied that the deprivation is conducive to the public good because the person, while having that citizenship status, has conducted him or herself in a manner which is seriously prejudicial to the vital interests of the United Kingdom, any of the Islands, or any British overseas territory, and (c) the Secretary of State has reasonable grounds for believing that the person is able, under the law of a country or territory outside the United Kingdom, to become a national of such a country or territory.”

<sup>86</sup> *Al-Jedda v SSHD* [2013] UKSC 62, [2013] WLR(D) 371; Theresa May discussed this point during the second reading of the Immigration Bill: 2014 HC Deb Vol 574, Col 1038, 30<sup>th</sup> January 2014.

the public good or where the passport had been fraudulently obtained.<sup>87</sup> The Home Office stance is to the effect that it would be "contrary to the public interest" to extend passport facilities to those whose activities are considered "undesirable". The package of counter-terror measures in the new 2015 Bill, includes extending these powers to provide the police and border officials with the power to seize passports of those about to travel (in Schedule 1). A TPIM could also be employed to order a person, as a temporary measure to prevent travel, to surrender a passport at the nearest police station.

David Cameron's package of counter-terror measures now introduced in the 2015 Bill aimed at British born 'jihadis' include deploying temporary exclusion orders against British fighters in Syria and Iraq seeking to return to Britain, meaning that they would be held temporarily outside Britain for up to two years (Chapter 2 of the 2015 Bill, clauses 2-11). The rationale would obviously be that since they were seeking to return from Syria or Iraq via other states, in particular Turkey, it would probably be clear at the point of entering that country where they were returning from – which would not be the case once they had mingled with tourists returning from Turkey to the UK – and so they could be detained at that point and prevented from continuing by imposing the order. The individual can be given a permit to return to Britain (clause 4) if he or she complies with a range of conditions under Schedule 1 TPIMA (clause 8 of the 2015 Bill). These orders would stop short of stripping them of citizenship and thereby rendering them stateless, but in reality could have the same effects as withdrawing citizenship since such persons would not be able to enter the UK and might be deemed to be in limbo as far as their nationality was concerned with no territory to return to, except the

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<sup>87</sup> See Gov.uk, "British passport eligibility", 8<sup>th</sup> November 2013; <https://www.gov.uk/british-passport-eligibility> (last viewed 04.10.14) and Gov.uk HM Passport Office, "Royal prerogative", 13 January 2012; [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/118554/royal-prerogative.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/118554/royal-prerogative.pdf) (last viewed 04.10.14). The power has been exercised 53 times since 2006: Melanie Gower "Deprivation of British citizenship and withdrawal of passport facilities" Briefing Paper, Home Affairs Section, SN/HA6820, 4<sup>th</sup> September 2014, p.4.



community of fighters termed ISIS. (ISIS is of course not recognised as a state by the UK, and fails to display virtually any of the indicia of a state.)

At present persons can be stripped of citizenship and have their passports withdrawn while inside or outside the UK, but only if they are dual nationals or naturalised citizens.<sup>88</sup> The question would be whether a measure making a person in effect stateless even on a temporary basis would be contrary to international law.<sup>89</sup> Proposals to seize passports to prevent return to Britain became mired in conflict between the Conservative leadership and the Liberal Democrats, and the legality of so doing is in doubt.<sup>90</sup> Brief temporary detention of persons suspected of involvement with ISIS or related groups after reaching a Turkish airport, to allow identification, *but* with the intention of transporting them to the UK, where a prosecution could be instituted, if the evidence was available as to involvement with IS, or an TPIM/ETPIM could be imposed, would not appear however to infringe international law on statelessness. Removal of the passport creates a travel restriction but is not equivalent to *de jure* removal of nationality, and the intention to transport such persons to the UK would indicate that no *de facto* imposition of statelessness was occurring.<sup>91</sup> If a temporary exclusion order is imposed on an individual, the British passport would be invalidated under the 2015 Bill, clause 3(9). Given that the period during which the order could be in force is two years,

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<sup>88</sup> Within s40(4),(4A) British Nationality Act 1981; see note 85.

<sup>89</sup> The 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness are the two international conventions that define who is a stateless person and set standards for protecting stateless persons. The right to a nationality is enshrined in the UDHR Art 15; see for discussion Mirna Adjami and Julia Harrington “The scope and content of Article 15 UDHR” *Refugee Survey Quarterly* (2008) 27(3) 93-109.

<sup>90</sup> Patrick Wintour “Cameron shelves move to ban jihadists coming to UK” *the Guardian*, 1<sup>st</sup> September 2014; <http://www.theguardian.com/politics/2014/sep/01/anti-terror-policy-legal-political-opposition-jihadis-uk> (last viewed 04.10.14); Jon Craig “Doubts about legality of snatching passports” *Sky News*, 1<sup>st</sup> September 2014; <http://news.sky.com/story/1328482/doubts-about-legality-of-snatching-passports> (last viewed 04.10.14).

<sup>91</sup> The situation would therefore not fall within the principle from *Al-Jedda v SSHD* [2013] UKSC 62, [2013] WLR(D) 371 (which concerned removal of citizenship, not merely of a passport) in which it was found that an individual with only a hypothetical past or future claim to a nationality may not be stripped of British citizenship ([34]).

the argument that the person has been rendered de facto stateless for a significant period of time is reinforced.

The withdrawal of citizenship from fighters in foreign conflicts – in particular in Syria or Iraq - who may have become more intensely radicalised or brutalised while fighting abroad, and may well have received weapons training, is now a possibility, unless the suspect was born in Britain.<sup>92</sup> Such withdrawal could also apply to a number of the more high risk suspects<sup>93</sup> who were previously subjected to control orders, then subjected to TPIMs.<sup>94</sup> 8 of the 9 suspects who were subject to TPIMs could not be detained pending deportation or extradition since they were all (bar one) British citizens; now that would depend on whether they were naturalised or born in Britain.<sup>95</sup>

A new provision depriving a British citizen of their passport outside the UK, albeit on a temporary basis, or stripping persons other than those born in Britain of citizenship while abroad, or deporting them, would tend to diminish their access to the ECHR *in practice*, but they would still be entitled to exercise the rights, which however do not include a right to a nationality. Where use of such measures prevented a suspect from re-joining family members in Britain that would have obvious Article 8 ECHR implications, but the Immigration Act 2014 s19 seeks to avoid successful Article 8 challenges based on the right to respect for a family life by providing that the courts must have regard to Parliament's view of what the

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<sup>92</sup> As recommended by the Home Affairs Committee 'Counter-terrorism Seventeenth Report', n 18, para 96.

<sup>93</sup> David Anderson, the Independent Reviewer of Terrorism Legislation, observed that "[t]he allegations against some TPIM subjects are at the highest end of seriousness, even by the standards of international terrorism. AM and AY are believed to have participated in the airline liquid bomb plot of 2006..." 'TPIMS in 2013,' n 14, para 3.7; see also Alan Travis 'Theresa May under pressure to reform counter-terrorism orders' *the Guardian*, November 2013; <http://www.theguardian.com/politics/2013/nov/05/theresa-may-counter-terrorism-orders-expire-january> (last viewed 04.10.14).

<sup>94</sup> TPIMA s 5.

<sup>95</sup> Anderson 'TPIMs in 2013' n 14 para 3.3.

public interest requires – set out in s19<sup>96</sup> - when considering Article 8 claims in immigration cases. Section 19 does not affect consideration of Article 7 of the EU Charter of Fundamental Rights, which provides a right to respect for private and family life, since it would appear that it would not be applicable to a person who had lost British citizenship under s66 since such a person would no longer be an EU citizen.<sup>97</sup>

### *Counter-radicalisation*

The development of further targeted measures designed to disrupt and prevent radicalisation are currently being explored within and beyond the use of TPIMs.<sup>98</sup> Further possible measures that are currently in contemplation – but were not in David Cameron’s 2014 package of measures appearing in the 2015 Bill - include using anti-social behaviour orders, termed terror and extremist behaviour orders (TEBOs) directed towards community leaders or radical preachers of Wahabi or Salafist tendencies (such as Anjem Choudary) seeking to radicalise others.<sup>99</sup> TEBOs could be deployed where the words spoken fell just outside the current glorification or incitement offences.<sup>100</sup> As was the case in relation to Asbos, the

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<sup>96</sup> Section 19 amends Part 5 of the Nationality, Immigration and Asylum Act 2002.

<sup>97</sup> “Consolidated version of the Treaty on European Union and the Treaty on the Functioning of the European Union” *Official Journal of the European Union* 2010/C 83/01, Part 2 Article 20.

<sup>98</sup> The counter-extremism think-tank Quilliam has supported this development. See Quilliam “The Limitations of Terrorism Prevention and Investigation Measures” Quilliam Policy Briefing, January 2014; <http://www.quilliamfoundation.org/wp/wp-content/uploads/publications/free/the-limitations-of-terrorism-prevention-and-investigation-measures.pdf> (last viewed 04.10.14).

<sup>99</sup> This proposal was advanced by the Prime Minister’s Task-force for Tackling Violent Extremism in “Tackling Extremism in the UK,” December 2013, para 2.3; [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/263181/ETF\\_FINAL.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/263181/ETF_FINAL.pdf) (last viewed 04.10.14). Terror and Extremist Behaviour Orders (Tebos) would mean that civil authorities could take action against people seeking to radicalise others. After the beheading of the journalist James Foley in August 2014 by ISIS, the Home Secretary confirmed that the introduction of TEBOs was probable – see “Theresa May: New Laws to Tackle British Jihadists” *the Daily Telegraph*, 22<sup>nd</sup> August 2014; <http://www.telegraph.co.uk/news/uknews/terrorism-in-the-uk/11052486/Theresa-May-New-laws-to-tackle-British-jihadists.html> (last viewed 04.10.14).

<sup>100</sup> Incitement: s59 TA 2000 covers inciting an act of terrorism outside of the UK which would involve the commission of the offences of murder, wounding with intent creating explosions or endangering life by damaging property if committed in England and Wales. Encouragement: s1(2),(3) TA 2006 covers publishing of a statement glorifying the commission or preparation of terrorist acts with intention/recklessness to encourage the commission/preparation of such acts.

orders could result in criminal convictions carrying a jail term if breached. This de-radicalising measure could fall within the *Prevent* framework which is directed towards supporting community leaders opposed to Salafism or Wahabism,<sup>101</sup> for example, through the partnerships and interventions programme.<sup>102</sup> A somewhat similar, but much broader proposal is for the introduction of Extremist Disruption Orders which would enable police to vet postings by extremists on Facebook and Twitter in advance and bar such persons from speaking at public events if they represent a threat to “the functioning of democracy”.<sup>103</sup> These new civil measures provide pathways to prosecution – but only for breach of their provisions, as should be openly acknowledged in debate as to their introduction.

It has also been proposed that the current power of proscription should be broadened to allow the banning of groups espousing violent extremism but not directly involved in terrorism. Currently, the threshold for banning membership of organisations, requires the Home Secretary to prove that the group commits, prepares, promotes or is ‘otherwise concerned’ with terrorism.<sup>104</sup> It is also provided in the 2015 Bill (Part 5, clause 21) that state-funded organisations, such as Universities, councils and schools, should have a new legal obligation

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<sup>101</sup> It should be noted that the attempt to fund Muslim groups that are ‘moderate’ has been extensively criticised in principle and application by both supporters and detractors of *Prevent*; see eg Ed Hussain “Beating the extremists: The government’s strategy of funding moderate Muslim groups is flawed, but it’s the right step towards winning the battle of ideas” *the Guardian*, 8 September, 2009; <http://www.theguardian.com/commentisfree/belief/2009/sep/08/moderate-muslim-groups-funding> (last viewed 04.10.14) cf Inyat Bunglawala “Calling time on *Prevent*: Has the era when all politically engaged Muslims were seen as being on a conveyor belt to extremism ended” *the Guardian*, 11<sup>th</sup> August, 2009; <http://www.theguardian.com/commentisfree/belief/2009/aug/11/prevent-islam-religion-extremism> (last viewed 04.10.14). The Home Affairs Committee has recently implicitly accepted Quilliam’s criticism of *Prevent* as failing to support liberal community leaders by acknowledging a failure to tackle the passive extremism of explicitly non-violent anti-liberal radicals: “Roots of violent radicalisation” Nineteenth Report, HC 1446, February 2012, para 21.

<sup>102</sup> Association of Chief Police Officers (ACPO) “*Prevent: Phase II of the Policing Response to the Prevention of Terrorism and Violent Extremism*” Development Plan 2010-2011, December 2009, at p. 34. See also Clive Walker “Conscripting the public in terrorism policing: towards safer communities or a police state?” [2010] *Criminal Law Review* 441.

<sup>103</sup> Theresa May, the Home Secretary, announced these plans at the annual party conference in Birmingham (see the *Telegraph* 30.9.14). The plans are to be adopted if the Conservatives win the election in May and are part of the wide-ranging set of new rules discussed intended to strengthen the Government’s counter-terrorism strategy.

<sup>104</sup> Section 3(5) TA 2000.

to combat extremists,<sup>105</sup> and that local authorities should put in place panels to which individuals vulnerable to being drawn into terrorism could be referred (clause 28).

### *Curbs on liberty on the control orders model – role of TPIMs*

As indicated, under the 2015 Bill the intention is to strengthen TPIMs, in particular by reinstating the ability to impose relocation (clause 12). So far the current government proposals in September 2014 and Parliamentary debate have not viewed the ETPIMs Bill as creating an alternative, although ETPIMs provide an existing potential alternative to TPIMs, and resemble control orders in terms of their ability to place stronger restrictions on suspects than are available under TPIMs, in particular to impose relocation. Once the 2015 Bill becomes law the higher standard of proof for the imposition of ETPIMs would be applied to TPIMs.<sup>106</sup> But Parliamentary scrutiny is stronger than under TPIMA: the ETPIM Bill could be introduced as an emergency measure with a one year renewal period as opposed to the 5 year period for TPIMA.<sup>107</sup> ETPIMs, like TPIMs, also expire after two years unless new TRA is present when they can be renewed.<sup>108</sup> If there is a case for the strengthening of TPIMs to meet the current threat level it would be met by introducing ETPIMs. ETPIMs, like control orders, can be ‘light’ or ‘heavy’ touch, and tailored to the degree of risk posed by the suspect.

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<sup>105</sup> Both proposals were put forward by the Home Secretary in August 2014 (see note 99). See clauses 21-27 of the new Bill.

<sup>106</sup> Clause 16(1). Under the ETPIM Bill The Secretary of State must be satisfied on ‘the balance of probabilities that the individual is, or has been, involved in terrorism-related activity’: Clause 2(1) ETPIM Bill. If the presence of the TRA is established on the balance of probabilities, it appears that either a TPIMs or ETPIM notice could be imposed, but not both at the same time (ETPIM Bill clause 4(1)). It may be noted that reliance in the Bill on a number of provisions of TPIMA, includes the definition of Terrorism-related activity (TRA) in TPIMA s4(1).

<sup>107</sup> Under clause 9(1) ETPIM Bill the provisions expire 12 months after the Act is passed. Under clause 9(2)(b)(i) the Secretary of State may, by order made by statutory instrument provide that ‘the Secretary of State’s enhanced TPIM powers are not to expire at the time when they would otherwise expire under subsection (1) or in accordance with an order under this subsection; but (ii) are to continue in force after that time for a period not exceeding one year’. The order must be made by the affirmative resolution procedure under clause 9(4). The provisions may also be repealed by order at any time, under clause 9(2)(a). Under clause 9(3) Consultation with (a) the independent reviewer; (b) the Intelligence Services Commissioner; and (c) the Director-General of the Security Service must occur before renewal. However, the Secretary of State can declare that by reason of urgency that procedure need not be followed – clause 9(5).

<sup>108</sup> Clause 2(6) Draft ETPIM Bill.

They could be used to ban people from broadcasting or protesting in certain places, as well as associating with specific people.

Strengthened TPIMs or ETPIMs would not necessarily breach Article 5 as a matter of domestic law if they imposed up to 14-16 hours house detention a day;<sup>109</sup> nor would an obligation imposing forced relocation which did not impose an unusual degree of social isolation on the controlee.<sup>110</sup> However, that result can only be reached by relying on a particular and limited domestic definition of the term ‘deprivation of liberty’ to place such measures outside Article 5’s ambit,<sup>111</sup> and due to the uncertainty as to what would constitute unusual isolation use of forced relocation might be found to create such a deprivation in particular cases. If a derogation from Article 5 ECHR was sought instead under Article 15, covering TPIMs deployed specifically to meet the threat posed by jihadi fighters in the UK, returnees from the ISIS conflict, then the analysis of the proportionality of such measures to that threat would be conducted openly and transparently. Imposition of forced relocation under a derogation should be based on specifically targeted *individual* risk assessments. If a specific use of detention did not meet the threat posed by a particular applicant it would represent a disproportionate response, meaning that the derogation would be invalid and, while that finding itself would not determine the ambit of Article 5(1),<sup>112</sup> Article 5 would be likely to be found to be breached.

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<sup>109</sup> *Secretary of State for the Home Department v JJ* [2007] 3 WLR 642 [105]; *Secretary of State for the Home Department v AP* [2011] 2 AC 1; see ‘Designing ETPIMS,’ n 3, pp. 879-81. Increasing the period of house detention under TPIMs is not part of the package of measures in the 2015 Bill.

<sup>110</sup> *Secretary of State for the Home Department v AP* [2011] 2 AC 1 [15].

<sup>111</sup> ‘Recalibrating ECHR Rights,’ n 8. But see also *Austin v UK* (2012) 55 EHRR 14 in which, albeit in relation to crowd control measures, the Court accepted that the ‘context’ could in effect lead to acceptance of a narrower ambit of Article 5(1) (paras 61-68).

<sup>112</sup> *A v UK* (2009) 49 EHRR 29 (Grand Chamber) paras 182-190.

But consideration of strengthening TPIMs should not be affected by the false promise of prosecution.<sup>113</sup> The idea that TPIMs/ETPIMs are designed to enable investigation and prosecution of the individual in question should be openly abandoned. Current debate as to their deployment should accept that they represent *alternatives* to prosecution, not pathways to it. In debating any balance that such measures might appear to strike between security and protection for human rights the prospect of prosecution should not be viewed as an aspect of the balancing act. It follows that TPIMs could also be modified to contain certain features likely to satisfy their purely preventive purpose, such as disallowing *all* access to social media, regardless of the notion that so doing could be inimical to the chances of prosecution. But use of ETPIMs instead would satisfy that purpose, although again the notion that they have an effective investigative role should be discarded in any deliberations as to their introduction.

Contrary to the objectives of the 2015 Bill Part 2, the role of TPIMs could be reimagined as one not involving direct curbs on liberty. If there is a case under the current threat level for reinstating relocation as one of a range of restrictions it would be preferable to achieve that via ETPIMs, given their status as emergency measures. The current virtual abandonment of TPIMs implies that they have failed in their role as a curb on the movement of suspects; their utility in imposing short periods of detention over-night is unclear.<sup>114</sup> Instead of strengthening them, if ETPIMs were introduced, TPIMs could be revised on their 5 year renewal and brought fully within the Prevent, rather than the Pursue strand of Contest, by deploying them

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<sup>113</sup> The Home Affairs Committee heard from the independent reviewer of terror laws, David Anderson, who said the government's anti-terror legal measures had failed to secure the "holy grail" of successful prosecutions of terror suspects. TPIMs were partly designed to give the police "added investigative opportunities", he said, but they had been no improvement on the control orders they replaced ("Counter-terrorism" Oral Evidence, HC 231-iii, November 2013, Q53).

<sup>114</sup> Quilliam considers that the programme of radicalisation in the UK is not fully understood: 'Jonathan Russell in Left Foot Forward: Understanding the Radicalisation that Led to the Attack on Lee Rigby' (February 2014); <http://www.quilliamfoundation.org/in-the-media/jonathan-russell-in-left-foot-forward-understanding-the-radicalisation-that-led-to-the-attack-on-lee-rigby/> (last viewed 04.10.14); for example, Quilliam strongly disputes the notion of the rise of 'lone wolf' terrorism, arguing that this understates the importance of this program and stirs up tensions between the British public and Muslims unnecessarily; see also Clive Walker, "Keeping control of terrorists without losing control of constitutionalism" (2007) 59 Stan. LR 1395 at 1398-99.

purely to counter radicalisation by inter alia barring persons from association with named others or from accessing certain internet materials. Redefining their role in this way would disassociate them from detention and from control orders. For the reasons given, the investigative label should also be dropped. Thus TPIMs could become part of the counter-radicalisation strategy rather than acting as a coercive, liberty-depriving means of preventing terrorist activity.

## **Conclusions**

A clearer divide should be created within the counterterror infrastructure between measures aimed at countering radicalisation and measures aimed at preventing terrorist activity at a later stage, after radicalisation has occurred. The use of control orders or TPIMs has, it is argued, blurred the line between the two and may also have contributed to a culture of criminal process avoidance. The criminal law is already taking and should continue to take the main role in coercive prevention of terrorist activity, given that the counter-terrorism offences available appear to be extensive enough to cover a range of preparatory acts, including planning to travel to support ISIS or related groups, or receiving training from them.

In so far as a case can be made under the raised threat level for the continued use, in relation to a small and residual group of suspects, of civil restriction measures on the control orders model, the notion of combining ‘preventive’ and ‘investigative’ roles in non-trial-based measures is misjudged due to the conflict which, as argued, inevitably exists between the two objectives, and because the combination obscures the basis for deploying measures such as



TPIMs.<sup>115</sup> The reasons for giving the preference to reliance on such measures, rather than criminal prosecutions in relation to particular suspects, appears to have provided a basis for avoiding prosecutions under the pretext that prosecution may only be delayed rather than ruled out, even where one of the very broadly-based early intervention terrorism offences might well have been applicable and a successful prosecution a possibility.<sup>116</sup> Erosion of the concept of citizenship via s66 of the Immigration Act 2014 and some enhancement of the prospects of prosecution of terror suspects might appear to have undermined the rationale for relying on measures on the control orders model. But in so far as prosecutions of certain suspects are required due to the raised threat level, but are genuinely problematic on national security grounds, there is a case for relying on the emergency measures of ETPIMs, possibly combined with a derogation, rather than on more ‘normalised’ TPIMs. However, it appears that the range of new measures, including proposed ones, are merely to be added to strengthened TPIMs, rather than viewed as a possible basis for abandoning that scheme.

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<sup>115</sup> For this reason the JCHR found that they should be re-named Terrorism Prevention Orders ‘TPIMA 2011’ n 16, Pt 3, para 2.

<sup>116</sup> In particular, s54 TA 2000 weapons training, s57 TA 2000 possession of article for terrorist purposes, s5 TA 2006 preparation for terrorist acts, s6 TA 2006 training for terrorism. See the material used in the SIAC decision in the E case for a possible example, *Secretary of State for the Home Department v E* [2007] WLR 720.